

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BRENDA FRANK,

Plaintiff,

vs.

ROHAN EARL MASCARENHAS, et al.,

Defendants.

Case No. 2:13-cv-01603-GMN-NJK

ORDER and

REPORT & RECOMMENDATION

Before the Court is Plaintiff's Motion to Remand, Docket No. 10. The Court has considered Plaintiff's Motion, Docket No. 10, and Defendant's Opposition, Docket No. 17. Also before the Court is Defendant Safeco Insurance Company of Illinois' Motion to Sever, Docket No. 6. The Court finds that these motions are appropriately resolved without oral argument. *See* Local Rule 78-2.

I. Procedural Background

Plaintiff filed her initial Complaint on June 27, 2013, in the Eight Judicial District of the State Court of Nevada. *See* Docket No. 10, at 3; Docket No. 17, at 4. On July 24, 2013, Plaintiff filed an Amended Complaint, which corrected the name of Defendant Rohan Earl Mascarenhas. *Id.* Both the Complaint and the Amended Complaint state that Plaintiff has incurred medical expenses and "does continue to incur such expenses." *See* Docket No. 17, at 4-5 (*quoting* Complaint and Amended Complaint). Paragraph 35 of both the Complaint and the Amended Complaint state that Plaintiff's "demand for payment and included medical records and bills that establish damages sustained by Plaintiff on December 21, 2011 exceeded \$100,000.00." *Id.* The Complaint and the Amended

1 Complaint also state that to date, Plaintiff's medical bills total \$19,119. Docket No. 10, at 7 (*citing*
2 Complaint and Amended Complaint). Throughout the Complaint, with the exception of the one time
3 that the figure \$100,000 is used in paragraph 35, Plaintiff repeatedly states that her damages exceed
4 \$10,000. *Id.*, at 7-8.

5 Prior to filing her Complaint on December 12, 2012, Plaintiff sent correspondence to Defendant
6 Mascarenhas' insurer indicating that she calculated her damages to be in excess of \$85,000. Docket No.
7 17-3. Nevertheless, on May 15, 2013, Plaintiff offered to settle with Defendant Safeco for \$59,000; and
8 as of September 12, 2013, Plaintiff demanded approximately \$58,000 to resolve this case. Docket No.
9 10-1, at 2.

10 On September 4, 2013, Defendants removed this case to the United States District Court for the
11 District of Nevada on diversity jurisdiction. Docket No. 1. In order to show that the amount in
12 controversy requirement is satisfied, the Petition for removal cites to paragraph 35 of the Complaint
13 which states that Plaintiff's damages exceed \$100,000. *Id.*, at 2-3.

14 On September 27, 2013, Plaintiff filed the present Motion to Remand asserting that the amount
15 in controversy is under the requisite \$75,000. Docket No. 10, at 9. According to Plaintiff, the \$100,000
16 listed in paragraph 35 is a "clear and obvious typographical error." *Id.* Defendant Safeco opposes
17 Plaintiff's Motion. *See* Docket No. 17.

18 **II. Legal Standard**

19 To establish subject matter jurisdiction pursuant to diversity of citizenship, a defendant
20 removing a case to federal court must show: (1) complete diversity of citizenship among opposing
21 parties and (2) an amount in controversy exceeding \$75,000. 28 U.S.C. § 1332(a).

22 Federal courts, as courts of limited jurisdiction, must strictly construe their jurisdiction.
23 *Duncan v. Stuetzle*, 76 F.3d 1480, 1485 (9th Cir. 1996)(*citing Gaus v. Miles, Inc.*, 980 F.2d 564, 566
24 (9th Cir. 1992)); see also *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). As
25 such, "[w]here doubt regarding the right to removal exists, a case should be remanded to state court."
26 *Matheson v. Progressive Specialty Ins. Co.*, 319 F.3d 1089, 1090 (9th Cir. 2003); *see also Durham v.*
27 *Lockheed Martin Corp.*, 445 F.3d 1247, 1252 (9th Cir. 2006) (noting that a district court resolves all
28 ambiguity in favor of remand).

1 When a complaint does not specify the dollar amount in controversy, the removing defendant
2 must prove by a preponderance of evidence that the amount in controversy exceeds \$75,000.
3 *Matheson*, 319 F.3d at 1090; see also *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 838 (9th
4 Cir. 2004) (holding that the burden of establishing federal jurisdiction is placed on the party seeking
5 removal). It is the amount in controversy at the time of removal which governs. *Id.* The amount in
6 controversy can include compensatory damages, punitive damages, and attorneys' fees (when
7 permissible), but not interest and costs. *Gibson v. Chrysler Corp.*, 261 F.3d 927, 945 (9th Cir. 2001)
8 (amount in controversy includes punitive damages); *Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1155
9 (9th Cir. 1998) (when authorized by law, attorneys' fees can be part of the amount in controversy); 28
10 U.S.C. § 1332(a) (amount in controversy excludes costs and interest).

11 To determine whether the removing defendant has met his burden, the Court considers the facts
12 alleged in the removal petition as well as any “ ‘summary-judgment-type evidence relevant to the
13 amount in controversy.’ ” *Matheson*, 319 F.3d at 1090 (*quoting Allen v. R & H Oil & Gas Co.*, 63 F.3d
14 1326, 1335–36 (5th Cir. 1995)). The removing defendant must support his claim for federal jurisdiction
15 with specific facts; conclusory or speculative arguments are insufficient. *Gaus*, 980 F.2d at 567.

16 A settlement offer can be relevant evidence of the amount in controversy, provided that the offer
17 reflects a reasonable value for the case. *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 840 (9th Cir. 2002).

18 **III. Analysis**

19 Defendant Safco asserts that this Court has diversity jurisdiction over this action. The parties do
20 not dispute that there is complete diversity in this matter; rather, the focus of this dispute concerns
21 whether the amount in controversy exceeds \$75,000.

22 Defendant Safeco asserts that the amount in controversy exceeds \$75,000, because Paragraph 35
23 of both the Complaint and the Amended Complaint state that Plaintiff’s “demand for payment and
24 included medical records and bills that establish damages sustained by Plaintiff on December 21, 2011
25 exceeded \$100,000.00.” Docket No. 10, at 7 (*citing* Complaint and Amended Complaint). Additionally,
26 Defendant Safeco asserts that because Plaintiff seeks damages beyond compensatory damages for
27 punitive damages, attorney’s fees, and costs, she is “clearly” seeking damages that exceed the amount in
28 controversy requirement. *Id.*, at 9. Finally, Defendant Safeco relies on the letter Plaintiff sent to

1 Defendant Mascarenhas' insurer, Progressive Insurance Claims, a non-party to this litigation, indicating
2 that she calculated her damages to be in excess of \$85,000, to support its contention that the amount in
3 controversy exceeds \$75,000. Docket No. 17-3.

4 Plaintiff, on the other hand, argues that the amount in controversy is under \$75,000. Docket No.
5 10. According to Plaintiff, the \$100,000 listed in paragraph 35 is a "clear and obvious typographical
6 error." Docket No. 10, at 9. To support this assertion, Plaintiff notes that her medical bills total
7 \$19,119, and, although she has sought more than \$19,119, on two occasions, both before and after
8 filing her lawsuit, Plaintiff has demanded significantly less than \$75,000 to resolve this case. *See*
9 Docket No. 10-1, at 2. Therefore, Plaintiff asserts, Defendant Safeco has not met its burden of showing
10 by a preponderance of evidence that the amount in controversy exceeds \$75,000. The Court agrees.

11 It is apparent from Plaintiff's pleadings that the \$100,000 listed in paragraph 35 was a
12 typographical error. Throughout the Complaint, Plaintiff repeatedly states that her damages exceed
13 \$10,000, and that her medical bills total \$19,119. Docket No. 10, at 7-8. Plaintiff's prayer for relief
14 also repeatedly states that the damages are "in excess of \$10,000.00." *Id.* Accordingly, Defendant
15 Safeco's reliance on the \$100,000 listed in paragraph 35 of the Amended Complaint is, at best,
16 misplaced.

17 Additionally, Defendant Safeco's assertion that the punitive damages, attorney's fees, and costs,
18 at issue in this case put the amount in controversy above \$75,000, is not supported by sufficient
19 evidence. First, costs cannot be calculated into the amount in controversy. *See* 28 U.S.C. § 1332(a).
20 Second, Plaintiff's medical bills total \$19,119 and, based on her settlement offers, it is apparent that she
21 is seeking to resolve this case for less than \$60,000 total.¹ The Court finds that this settlement offer is
22 relevant evidence of the amount in controversy because it reflects a reasonable value for the case. *See*
23

24 ¹Defendant Safeco asserts that Plaintiff's counsel's affidavit, which states that Plaintiff offered to
25 settle this case for under \$60,000 on two occasions, is "not effective" to diminish a finding that the
26 amount in controversy is in excess of \$75,000. Docket No. 17, at 10. The Court disagrees. The affidavit
27 is made under oath and Defendant Safeco has provided no evidence which indicates that the statements
28 made therein are false. In fact, the Court notes, that at no point in its opposition does Defendant Safeco
deny that the \$58,000 and \$59,000 settlement offers occurred. Additionally, the burden of proof is on
Defendant, who filed the petition, not Plaintiff.

1 *Cohn*, 281 F.3d at 840.

2 Finally, the letter Plaintiff sent to Defendant Mascarenhas' insurer, Progressive Insurance
3 Claims, which indicates that Plaintiff calculated her damages to be in excess of \$85,000, is not
4 sufficient evidence to show that the amount in controversy exceeds \$75,000. Docket No. 17-3.
5 Progressive Insurance Claims is not a party to this litigation. Therefore, the amount of damages Plaintiff
6 demanded from that entity prior to the commencement of this litigation have little bearing on this
7 matter. Further, the letter was sent before the May 15, 2013, settlement offer of \$59,000. Since it is the
8 amount in controversy at the time of removal which governs, the May 15, 2013, offer superseded any
9 prior demands. *See Matheson*, 319 F.3d at 1090. Therefore, at the time of removal, the amount in
10 controversy did not clearly exceed \$75,000. "Where doubt regarding the right to removal exists, a case
11 should be remanded to state court." *Matheson*, 319 F.3d at 1090 (9th Cir.2003). In this case, Defendant
12 Safeco has not proven by a preponderance of evidence that the amount in controversy exceeds \$75,000.
13 Accordingly, it is the recommendation of the undersigned Magistrate Judge that this case be remanded
14 to the State Court of Nevada.

15 **VI. Attorney Fees**

16 In addition to requesting remand, Plaintiff has requested an award of attorney's fees on the
17 grounds that Defendant Safeco lacked an objectively reasonable basis for seeking removal. Considering
18 that the basis of Defendant Safeco's petition for removal was a typographical error made by Plaintiff,
19 the undersigned Magistrate Judge recommends that Plaintiff's request for an award of attorney's fees
20 be denied.

21 **V. Motion to Sever**

22 Since it is the recommendation of the undersigned Magistrate Judge that this case be remanded
23 to the State Court of Nevada, the Court finds that the Motion to Sever is more appropriately resolved by
24 the State Court of Nevada and therefore denies Defendant Safeco's Motion to Sever as moot.

25 **VI. Conclusion**

26 Based on the foregoing, and good cause appearing therefore,

27 IT IS HEREBY ORDERED that Defendant Safeco Insurance Company of Illinois' Motion to
28 Sever, Docket No. 6, DENIED.

1 IT IS THE RECOMMENDATION of the undersigned United States Magistrate Judge that
2 Plaintiff's Motion to Remand, Docket No. 10, be GRANTED in part and DENIED in part.

3 IT IS FURTHER RECOMMENDED that this case be remanded to the State Court of Nevada.

4 IT IS FURTHER RECOMMENDED that Plaintiff's request for an award of attorney's fees be
5 DENIED.

6
7 DATED this 18th day of October, 2013.

8
9
10 
11 NANCY J. KOPPE
12 United States Magistrate Judge

13 **NOTICE**

14 Pursuant to Local Rule IB 3-2 **any objection to this Report and Recommendation must be in**
15 **writing and filed with the Clerk of the Court within 14 days of service of this document.** The
16 Supreme Court has held that the courts of appeal may determine that an appeal has been waived due to
17 the failure to file objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This
18 circuit has also held that (1) failure to file objections within the specified time and (2) failure to
19 properly address and brief the objectionable issues waives the right to appeal the District Court's order
20 and/or appeal factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157
21 (9th Cir. 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).
22
23
24
25
26
27
28